

Amendment to the Foreign Investment Promotion Act



By Kyu-Young Park and Ghil-Won Jo

The current Monopoly Regulation and Fair Trade Act (MRFTA) of Korea generally prohibits a second-tier company (i.e., a domestic company whose business is controlled by the subsidiary of a general holding company) from owning stock in the second-tier company's Korean affiliate company except under limited circumstances, such as where the affiliate company owns the entire number of issued shares of stock. Due to this restriction, second-tier companies were unable to form joint ventures with foreigners. To mitigate this situation and allow the formation of joint ventures with second-tier companies, the Foreign Investment Promotion Act (FIPA) was recently amended (resolution adopted by the National Assembly on January 1st, 2014, public announcement on January 10, 2014, effective March 11, 2014).

Amendments

1. Under the amendment, notwithstanding the MRFTA, a second-tier company of a general holding company is permitted to own stock in a joint venture company formed between the second-tier company and a foreigner if: (i) the second-tier company owns 50 percent or more of the total number of shares issued by the joint venture company (owning all shares except for the shares owned by the foreigner); (ii) the foreigner owns 30 percent or more of the shares of the joint venture company; and (iii) the investment qualifies as an 'individual-type (*gaebul-hyung*) foreign investment' (i.e., foreign investment which satisfies certain requirements prescribed by Presidential Decree including the size of the investment, and allows the foreign investor to designate a specific area it wishes to invest in) under the FIPA.

2. For a second-tier company to own shares of a joint venture company pursuant to Article 30 Section 6 of the FIPA, the second-tier company must undergo an assessment process overseen by the Fair Trade Commission, to determine whether it has complied with the requirements prescribed by Presidential Decree, before obtaining approval from the Foreign Investment Committee (Article 30, Section 7 of the FIPA).

Pre-legislation announcement of the FIPA Enforcement Decree

On January 10th, 2014, the Ministry of Industry, Trade and Energy of Korea announced that it will enact the Enforcement Decree of the amended FIPA. This pre-legislation announcement contained anticipated

regulations pertaining to the assessment process to be undertaken by the Fair Trade Commission before the second-tier company obtains approval from the Foreign Investment Committee.

According to the pre-legislation announcement, Article 39-2 (Pre-Approval Assessment Requirements) of the Enforcement Decree is expected to set forth the following pre-approval assessment requirements applicable to second-tier companies:

- The business of the joint venture company must be any one of the following:
 - Production or sale of products or services of which the second-tier company's product or service is a main component of production;
 - Supply of raw materials or services that are required by the second-tier company in its business;
 - Research and development relating to products or services produced or provided by the second-tier company;
 - Production or sale of products or services identical to those of the second-tier company's business, or they utilise substantially similar production technology as the products or services provided by the second-tier company; or
 - Other businesses closely related to the business of the second-tier company.
- Compared to the subsidiary, the second-tier company should satisfy the following requirements to qualify as a more appropriate party to the joint venture:
 - the business of the joint venture should be more closely related to the second-tier company; and
 - the second-tier company is a more appropriate party to the joint venture, because of management-related circumstances such as ownership changes, overlapping investment, reallocation of human resources, etc.
- The joint venture formed by a second-tier company and a foreigner should qualify as a joint venture company within the meaning of Article 8-2, Section 1, Subsection 1 of the MRFTA;
- The second-tier company's investment in the joint venture company should comply with the prohibition against circular-shareholding arrangements contained in the MRFTA; and
- Other matters that the Foreign Investment Committee deems necessary to be reviewed by the Foreign Trade Commission.

Lee International IP & Law Group

Poongsan Bldg. 23, Chungjeongro
Seodaemun-gu, Seoul 120-013, Korea

Tel: 82 2 2279 3631

Fax: 82 2 2273 4605

Email: kypark@leeinternational.com

gwjo@leeinternational.com

www.leeinternational.com